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RE CHAN PECK HEAY & ANOTHER CASE; EX P GOODYEAR MALAYSIA BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
b [BANKRUPTCY NOS. 29-213-93 & 29-214-93]
14 APRIL 2002

BANKRUPTCY: *Bankruptcy notice - Validity - Bankruptcy notice not in accordance with judgment - Procedure to challenge validity - Judgment debtor preferred proviso (ii) to s. 3(2) of Bankruptcy Act 1967 - Whether proper -*
c *Bankruptcy Rules 1969, r. 18 - Whether failure to follow proper mode fatal to application to invalidate bankruptcy notice*

There were two appeals heard before this court involving identical issues. Essentially, this court had to decide upon the validity of the procedure adopted by the judgment debtor ('JD') in seeking to set aside the bankruptcy notice
d taken by the judgment creditor. Previously, the senior assistant registrar had dismissed the JD's application.

Relying upon proviso (ii) to s. 3(2) of Bankruptcy Act 1967 ('the Act'), the JD's application to set aside the bankruptcy notice was premised on the
e contention that the sum specified in the bankruptcy notice was not in accordance with the terms of judgment in that it exceeded the amount actually due to the judgment creditor.

Held:

f **[1]** A bankruptcy notice could only be challenged either under r. 95 or r. 18 of the Bankruptcy Rules 1969 ('the Rules'). Rule 95 provides the only instance where the filing of an affidavit is treated as an application and a debtor seeking to challenge the validity of a bankruptcy under this rule must be able to show that he has a counter claim, set off or cross demand
g which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained.
(p 393 e-f)

[2] Rule 18 states that an application to set aside has to be in the form of a summons in chambers supported by affidavit. This would be the correct
h mode for a debtor seeking to set aside a bankruptcy notice where it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment. (p 393 g-h)

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[3] The JD's application to set aside the bankruptcy notice should have been made under r. 18, and not under proviso (ii) to s. 3(1) of the Act. As the provision requires mandatory compliance, the JD's failure to follow r. 18 was fatal to her objections to invalidate the bankruptcy notice. (p 394 a)

[Judgment debtor's appeals dismissed with costs.]

Case(s) referred to:

Development & Commercial Bank Berhad v. Datuk Ong Kian Seng [1995] 3 CLJ 307 ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 ***(foll)***

Lim Kheng Kim v. Malayan Banking Berhad [1993] 3 CLJ 324 ***(refd)***

Re Chew Chee Sun; ex p Chan Theam Soon [2000] 4 CLJ 144 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i), (2)(ii)

Bankruptcy Rules 1969, rr. 18, 94(1)(b), 95(1)

For the judgment debtor - Khalid Mohamad; M/s Rithauddin & Azlin

For the judgment creditor - T Sudharsanan; M/s Shook Lin & Bok

Reported by M Maheswaran

JUDGMENT

Nik Hashim J:

There are two appeals before the court and both of them raise identical issues. In the circumstances, the parties have agreed that the decision in respect of encl. 33A (No. 29-213-93) bind the parties in respect of encl. 27A (No. 29-214-93). The court acceded to the agreement.

The appellant judgment debtor ("the JD") appealed against the decision of the learned senior assistant registrar given on 20 February 2001 dismissing the JD's application to set aside the bankruptcy notice ("the BN") that the judgment creditor ("the JC") had taken out against her.

In this case, it is pertinent to note the difference between the terms of the grounds of decision and the terms of the sealed judgment of the Sessions Court Kuala Terengganu given on 22 November 1992 *vide* summons No. 24-147-1987. The terms of the grounds of decision of the learned judge reads as follows:

> Setelah meneliti keseluruhan dan penyata-penyata yang dikemukakan, Mahkamah mendapati pihak plaintif telah berjaya mengasaskan tuntutan mereka terhadap defendan. Dengan itu, tuntutan plaintif terhadap defendan bagi jumlah RM67,099.21 dibenarkan dengan faedah 8% setahun daripada tarikh penghakiman hingga tarikh penyelesaian dan kos.

Whereas the terms of the sealed judgment upon which the BN was founded, however, state the commencement of the date of interest differently as follows:

> ... bahawa defendan hendaklah membayar kepada plaintif jumlah sebanyak RM67,099.21 dengan faedah ke atasnya pada kadar 8% setahun **daripada 7.4.1987** sehingga ke tarikh pembayaran sepenuhnya dan kos RM9,697.00. (emphasis added)

Thus, according to the JD, the amount of interest that was wrongfully claimed for a period of 5 1/2 years more (from 7 April 1987 to 22 November 1992) under the BN amounted to RM29,523.67, a substantial sum, substantial enough to invalidate the BN in this case.

The BN was served on the JD on 14 August 1993. On 15 August 1993, the JD filed a notice pursuant to the proviso (ii) to s. 3(2) of the Bankruptcy Act 1967 (the Act) alleging that the BN was invalid by reason that the sum specified in the BN as the amount due exceeds the amount actually due to the JC. And on 17 August 1993 the JD filed an affidavit (encl. 3A) and on 17 August 1994 a further affidavit (encl. 20A) was filed, both under r. 95 of the Bankruptcy Rules 1969 (the Rules) as an application to set aside the BN on the grounds: first, that the sum claimed was more than what was actually due to the JC and second, that the JD had a counter claim amounting to RM47,570.89 against the JC. The second ground however, was abandoned by Encik Khalid. As the case stands, the JD does not have a valid counter-claim, set off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained within the meaning of s. 3(1) of the Act and within the meaning of r. 94(1)(b) of the Rules.

With regard to the first ground, Encik Khalid argued forcefully that the amount demanded in the BN is not in accordance with the terms of the judgment and on the recent authority of the Court of Appeal case of *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104, the BN ought to be set aside *in limine* by reason of the excess, and he claimed that the procedure he adopted was correct and proper.

In my view, the claim for the excess of interest is unfair and surely, such claim will cause a miscarriage of justice if the JD is not allowed to go behind the sealed judgment. The amount of interest claimed in the sealed judgment is wrong, being more in quantum than what was actually allowed in the grounds of decision of the learned Sessions Court judge.

Thus, the only issue to be decided in the present case is whether the JD's application is procedurally correct to invalidate the BN.

In *J Raju, supra*, the judgment debtor appealed against the High Court's dismissal of his application to set aside the BN issued against him by the judgment creditor. The application by way of a summons was filed by the judgment debtor pursuant to r. 18 of the Rules. Prior to the filing of the application, the judgment debtor had also, pursuant to r. 95 of the Rules, applied by way of affidavit to set aside the BN. There, the BN included a demand of "several sums of penalty interest" and a claim of "RM80 as stamp duty", both of which are not within the terms of the judgment. There is only one issue in that case, ie, it concerns the validity of the BN by reason of the said excess demands. The Court of Appeal held:

> It is a condition precedent to the exercise of bankruptcy jurisdiction, that a BN shall require a debtor to pay a judgment debt in accordance with the terms of the judgment upon which the BN is founded. On the facts, the appellant's complaint was that the BN had not been issued in accordance with the judgment and not merely that the respondent had mistakenly claimed for more than what was actually due to it. The appellant's challenge of the BN thus fell well outside the scope of proviso (ii) to s 3(2) of the Act, and was instead a jurisdictional challenge ie, a separate and distinct head of challenge under s. 3(1)(i) of the Act. In this respect, the appellant had sufficiently made out his complaint, and had acted in accordance with the procedure prescribed under Rule 18 of the Rules. In the circumstances, the BN was therefore a nullity as at the date of its issue.

It has been established by high authorities which bind this court that there are only two ways to challenge a BN ie, under r. 95 or under r. 18 of the Rules. In the Rules, the only instance where the filing of an affidavit is treated as an application for the purpose of having a BN set aside is under r. 95(1) of the Rules. A debtor who seeks to challenge the validity of a BN under r. 95(1) must be able to show that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. In every other instance, where there is a need to obtain a decision of the court, an application is necessary, and the application, according to r. 18 of the Rules, has to be in the form of a summons in chambers supported by affidavit (see *Re Chew Chee Sun; ex p Chan Theam Soon* [2000] 4 CLJ 144; *Lim Kheng Kim v. Malayan Banking Berhad* [1993] 3 CLJ 324 SC).

Consequently, where the debtor is seeking to set aside a BN on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment, the debtor must make an application in that behalf in accordance with r. 18 of the Rules. The JD's challenge of the BN that it had not been issued in accordance with the terms of the judgment is outside the scope of proviso (ii) to s. 3(2) of the Act and is instead a jurisdictional

challenge which is a separate and distinct head of challenge under s. 3(1)(i) of the Act (see *J Raju, supra*). Therefore, the JD's application to set aside the BN should have been made under r. 18 of the Rules. The provisions of r. 18 are mandatory. Thus, failure to follow r. 18 by the JD is fatal to her objections to invalidate the BN. (see *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307 FC).

Applying the above stated principles strictly to the present case, I, with respect, agree with the learned counsel Mr T Sudharsanan that the JD's application to set aside the BN having not been made under r. 18 of the Rules is bad and defective in law. The procedure adopted by the JD by filing a notice under the proviso (ii) to s. 3(2) of the Act and the filing of the affidavits (encls. 3A and 20A) under r. 95(1) of the Rules is not procedurally correct. The correct procedure, as was done in *J Raju*, is by way of a summons in chambers supported by affidavit under r. 18 of the Rules.

I, therefore, hold that the affidavits (encls. 3A and 20A) are not properly an application for invalidating the BN to pay a judgment debt otherwise than in accordance with the terms of the judgment. The JD has failed to comply with the correct mode of opposition to the JC's BN as prescribed under r. 18 of the Rules.

Thus, for the aforesaid reasons, the appeals in Bankruptcy Nos. 29-213-93 and 29-214-93 are accordingly dismissed with costs. The decisions of the learned senior assistant registrar in both appeals are hereby affirmed.